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NO. 85-37 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

RODNEY AND EMILY SPENDLOVE,

APPELLANTS,

V.

ANCHORAGE MUNICIPAL ZONING
BOARD OF EXAMINERS AND APPEALS,
AND UPPER DE ARMOUN AREA HOMEOWNERS
ASSOCIATION INC.,

APPELLEES.

ON APPEAL FROM THE ALASKA SUPREME COURT

OPPOSITION TO MOTION TO DISMISS

RODNEY AND EMILY SPENDLOVE
P.O. BOX 144
ANCHORAGE, ALASKA 99510

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SUMMARY OF ARGUMENT

The record truely reflects that the federal question of denial of due process for failure of the state judge to recuse himself; was timely presented to the state supreme court on appeal; and the challenge to the Constitutionality of the state recusal statute was filed in the petition for rehearing; after the state supreme court ignored the issue. Defendants admit to the timeliness in the Motion to Dismiss.

In the matrix of the factual arguments by both sides to this appeal, a salient picture emerges of what a reasonable person could only conclude as an 'appearance of bias.'

Both sides have painted a picture of turmoil and contention that by its very existence draws of one conclusion; that there is a strong appearance of bias and prejudice; an appearance so strong as to compel

a conclusion of actual bias and prejudice in fact.

A judge sits on a committee that is in the vanguard of shutting down the plaintiff's gravel pit: the judge's committee is financed by the parties to this case; and the municipality, a party here, is organizing a municipal bonding effort for the judge's committee; the success of the bonding directly related to the All-American City application given final review by the judge; an application specifically focusing on the eradication of plaintiff's gravel pit!

STATEMENT OF FACTS: TO CORRECT DEFENDANTS' MISREPRESENTATIONS

1. The Defendants Fianaced The Organization The Judge Was Vice-Chariman Of

At the 16 October,1978 in-chambers hearing, the state judge admitted that his organization, 'Breakthrough,' was working

with the Municipality of Anchorage on a municipal bond proposal to finance Breakthrough. [TR.,pp.526-527]

The Municipality is a party to this action.

As pointed out in the Jurisdictional Statement, the other financing for Breakthrough was coming from the other party to this case:

1) Herb Lang, president of Alaska Sand and Gravel, was a member of the Steering Committee of Breakthrough;

2) Mr. Gellert, majority owner of Alaska Sand and Gravel, was a cross-appellant in the state court;

3) Alaska Sand and Gravel was the major fianacial contributor to Breakthrough. [Jurisdictional Statementppp.7-12]

Both parties defendant were financing the judge's committee; and were actively involved with the judge in his committee.

2. The All-American City Application Was Contingent On The Municipal Breakthrough Bonds Issue

The evidence revealed that there was a connection between the success of the municipal bond issue for 'Breakthrough,' and the All-American City application. [TR.,551-577]

3. The All-American City Application Reviewed By The Judge: Specifically Referred To Mr. Spendlove's Gravel Pit; The Gravel Pit That Is The Subject Matter of This Case

Affidavits and testimony submitted at the recusal hearing on 19 October,1978, attest to the facts that:

1) Jean Buchanan, director of the Anchorage Federation of Community Councils, prepared the All-American City application;

2) Spendlove's gravel pit was the focus of the All-American City application as an example of community council activism; an activism participated in by the judge's committee, Breakthrough;

3) Jean Buchanan specifically referred to Mr. Spendlove's gravel pit in the application;

4) the judge, as vice-chairman of Breakthrough, reviewed the application with its direct reference to Spendlove's pit;

5) Jean Buchanan specifically told Allan Tesche, municipal attorney and attorney of record in this case; that the Spendlove pit was the pit referred to in the application;

6) Spendlove's gravel pit was within the jurisdiction of the Hillside Community Council: the council was waging dn open campaign of newspaper advertisings and bumper stickers against Mr. Spendlove's pit; the campaign focused on drawing a parallel between the notorious 'Hillside' rapist in California(which was receiving national coverage), and Mr. Spendlove's gravel operation in the "Hillside' area of Anchorage. The judge was aware of this campaign. [TR.,551-577]

ARGUMENT

I. CONSTITUTIONAL FACT - THE DOCTRINE OF JURISDICTIONAL FACT IN A SPECIAL FORM: A JUDGE SERVING AS A VICE-CHAIRMAN OF AN ORGANIZATION RECEIVING FUNDING FROM DEFENDANTS: AND PRESIDING IN A SUIT THE DEFENDANTS ARE PARTY TO: IS PRECLUDED ON CONSTITUTIONAL GROUNDS FROM HEARING THE CASE AND MUST RECUSE HIMSELF

The federal right to an unbiased judge and a judge without a conflict of interest, is protected by the Fourteenth Amendment.

The doctrine of Constitutional Fact is the doctrine of jurisdictional fact in a special form. The Constitutional Fact question arises where the fundamental or jurisdictional determinations of fact revolve around the observance of Constitutional restrictions in actions brought to enforce Constitutional rights. Crowell v. Benson, 285 U.S. 22(1932); Fiske v. Kansas, 274 U.S. 380,385-386(1927); Creswill v. Pythias of Georgia, 225 U.S. 246,261(1912);

St. Joseph Stockyards v. United States, 298 U.S. 38,49-53(1936).

Alaska Statute 22.20.020, Disqualification of judicial officer for cause; is jurisdictional. The state judge had no jurisdiction under the statute to hear the case; recusal was mandatory; based on the Constitutional jurisdictional facts: the judge was being financed by both parties defendant; and his committee was specifically attempting to shut down plaintiff's gravel pit.

The Supreme Court of the United States does review jurisdictional facts; where a conclusion of law as to a Federal right and a finding of fact are so intermingled; as to make it necessary to analyze the facts in order to pass on the Federal question. Northern Pacific R. v. North Dakota, 236 U.S. 585,593; Aetna Life Ins. v. Dunken, 266 U.S. 389,394, and cases cited.

II. LACK OF JURISDICTION IS NOTICEABLE AT ANY STAGE OF THE PROCEEDINGS: EVEN ON THE COURT'S OWN MOTION

Lack of jurisdiction is noticeable at any stage of a case's proceedings; jurisdiction is primary and fundamental to a court's authority; and can be noticed by a court on its own motion. Sumner v. Mata, 449 U.S. 539,547; Louisville and N.R.Co., v. Mottley, 211 U.S. 149(1908).

The state court had no jurisdiction to proceed because of the fundamental denial of Due Process. A state judge with a direct conflict of fianacial interest, and leadership in a group advocating shutting down the gravel pit in contention; is barred by the principle of Due Process under the Fourteenth Amendment.

III. THE STATE SUPREME COURT REFUSED TO ADDRESS THE JURISDICTIONAL ISSUE OF A.S. 22.20.020; ORIGINALLY ARGUED ON APPEAL AND AGAIN IN THE PETITION FOR REHEARING: SINCE THE ISSUE IS FUNDAMENTAL AND JURISDICTIONAL: FAILURE TO ADDRESS THE ISSUE IS PRESUMPTIVELY A DENIAL OF THE FEDERAL ISSUE

There is no non-federal ground of decision that can override the Federal issue of lack of jurisdiction under the Due Process clause.

The state supreme court never addressed the primary issue of jurisdictional Due Process: the court's silent treatment is an untenable state ground.

When the non-federal ground is so interwoven with the federal so as not to be an independent matter, the federal jurisdiction is plain. Moran v. Horsky, 178 U.S. 205; Creswill v. Knights of Pythias, 225 U.S. 246,261. When the state and federal claims come into conflict, the primacy of federal power requires that the federal finding of fact control. England v. State Board of Examiners, 375 U.S. 411,415-417(1964); Townsend v. Sain, 372 U.S. 293,311-312(1963).

If the United States Supreme Court is unable to discover an adequate non-federal ground in support of the state court judgment

on the issue of jurisdiction; '[i]t will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction.' Klinger v. Missouri, 13 Wall 257,263; Johnson v. Risk, 137 U.S. 300,307; Lawrence v. State Tax Commission. 286 U.S. 276,282-283.

IV. AN ATTACK UPON THE CONSTITUTIONALITY OF A STATE STATUTE IS TIMELY IF RAISED IN A PETITION FOR REHEARING: WHEN THE ACT COMPLAINED OF IS THAT OF THE STATE SUPREME COURT

The failure of the Alaska Supreme Court to address the federal question of jurisdiction - the recusal of the state judge under the Fourteenth Amendment; gave rise to the additional federal claim that A.S. 22.20.020 was unconstitutional as applied by the state Supreme Court; who sub silencio affirmed the lower court's recusal denial.

The petition for rehearing timely

raised the federal appeal issue; because that was the first opportunity to address the state supreme court's construction of the statute. [Jurisdictional Statement,p.32] Brinkerhoff-Faris Co. v. Hill, 281 U.S.673, 677-678(1930).

The act complained of is that of the state supreme court. The court cannot ignore the fundamental jurisdictional question presented under the Fourteenth Amendment; without itself putting an unconstitutional construction on the state statute.

The construction of a state statute that infringes federal rights may be first presented by petition for rehearing. Missouri ex rel Missouri Ins. Co. v. Gehner, 281 U.S. 313,320(1930); Pruneyard Shopping Center v. Robins, 447 U.S. 74,84-87(1980).

V. DEFENDANTS ADMIT THAT THE FEDERAL QUESTION OF THE JUDGE'S FAILURE TO RECUSE HIMSELF; WAS PRESENTED IN THE STATE SUPREME COURT

Defendants admit that the federal question was timely submitted to the state supreme court. [Motion to Dismiss,p.8]

Plaintiff and defendants argued the issue in their briefs before the state supreme court. [Plaintiff's state brief, pp.27-29; defendants' state brief,pp.60-64]

CONCLUSION: The United States Supreme Court should take appellate jurisdiction of this appeal: the issue presented strikes at the most basic and fundamental jurisdictional issue: the Right to an unbiased and impartial judge; the Right to have a judge hear the case, who does not have a direct financial stake in the issues.

The disqualification is based on the 'appearance' of bias; in this case there is bias in fact. RESPECTFULLY SUBMITTED, August,1985.

Rodney Spendlove